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No. 07-1608

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ANDRE SEYMOUR, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT REPLY OF PETITIONERS IN SUPPORT

Michael J. Summerhill
Katten Muchin Rosenman LLP
525 West Monroe Street
Chicago, Illinois 60661
312-902-5200
Counsel of Record

Michael J. Summerhill
Bryan F. Stroh
Katten Muchin
Rosenman LLP
525 West Monroe Street
Chicago, Illinois 60661
312-902-5200
Counsel for Petitioner
Stacia Smith

Kent R. Carlson
Kent R. Carlson &
Associates P.C.
53 West Jackson Blvd.
Suite 1544
Chicago, Illinois 60604
312-663-9601
Counsel for Petitioner
Troy Lawrence

Daniel P. Albers
Barnes & Thornburg
1 N. Wacker Dr.
Suite 4400
Chicago, Ill. 60606
312-357-1313
Counsel for Petitioner
Andre Lawrence

James A. Shapiro
Shapiro & Brindley
53 West Jackson Blvd.
Suite 1001
Chicago, Illinois 60604
312-782-4615
Counsel for Petitioner
Kent Clark

Richard L. Zaffiro
4261 N. 92nd St.
Wauwatosa, WI 53222-
1617
414-737-1956
Counsel for Petitioner
Andre Seymour

Franklin C. Cook
524 W. Stephenson St.
Freeport, IL 61032
815-233-5711
Counsel for Petitioner
Artrez N. Seymour

Counsel for Petitioners

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JOINT REPLY OF PETITIONERS

INTRODUCTION

In its Brief in Opposition ("Response" or "Resp. at __"), the Government concedes that the circuit courts of appeals are split on the question of whether individual drug-conspiracy defendants are, under the Sixth Amendment, entitled to a jury finding of the quantity of drug attributable to or reasonably foreseeable by each defendant. The Government further concedes that Petitioners appropriately raise this question. (Resp. at 7-8 (conceding appropriate conviction to raise issue, timely objections and timely appeals.).) Notwithstanding these concessions, the Government contends that the Petition should be denied both because the decision below is correct and, if not, the *Apprendi* error is harmless. The Government's arguments are without merit.

Whether the Seventh Circuit's decision is correct, as the Government argues, actually supports this Court's grant of the Petition because, regardless of which position is correct, there is a conflict that only this Court can resolve. Moreover, there are two fatal flaws with the Government's harmless error argument. First, it presupposes an *Apprendi* error. Indeed, the cases upon which the Government relies to advance its harmless error argument all involve admitted *Apprendi* errors. Here, the Seventh Circuit held that there was no *Apprendi* error. Second, and more importantly, the Government's harmless error argument further highlights the conflict on this important issue of constitutional law because it ignores conflicting authority that holds that an

enhanced sentence under Section 841(b)(1) without supporting jury findings is reversible error ***even if*** the defendant's sentence does not exceed the statutory maximum of the default range. Thus, this case is appropriate for resolution by this Court.

ARGUMENT

I. THE GOVERNMENT CONCEDES THAT THE COURTS OF APPEALS DISAGREE ON THIS IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

The Government concedes, as it must, that there is "disagreement among the courts of appeals," (Resp. at 15), as to whether the Sixth Amendment requires a jury to find the quantity of drug attributable to or reasonably foreseeable by each individual defendant in a drug conspiracy case before a defendant may be sentenced under an enhanced penalty range of Section 841(b)(1). The Government, however, attempts to downplay the extent of the conflict by drawing arbitrary and irrelevant factual distinctions between the cases to exclude the Second and Ninth Circuits from the conflict.[1/] A review of

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1/ The Government also takes issue with Petitioners' discussion of *United States v. Graham*, 317 F.3d 262 (D.C. Cir. 2003) (Resp. at 16; Pet. at 17 n.2) and *United States v. Nelson-Rodriguez*, 329 F.3d 12 (1st Cir. 2003) (Resp. at 12 n.1; Pet. at 18-19 n.3). However, there is no true disagreement. Petitioners explained that, while the Court of Appeals for the District of Columbia has not directly decided the question at issue, it indicated its disagreement with the conspiracy-wide approach in *Graham*. (Pet. at 17 n.2.) The Government merely points out that, as explained by Petitioners, the *Graham* court did not directly decide the question presented by this Petition. (Resp.

the cases, however, reveals that the Second and Ninth Circuits, like the Fourth Circuit, require a jury to find the quantity of drug for which an individual defendant in a drug conspiracy case is culpable beyond a reasonable doubt before that defendant may be subject to the enhanced sentencing ranges. In these circuits, the jury must find the extent of each defendant's involvement in the conspiracy consistent with this Court's mandate for conspiracy cases. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) ("A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.")

To argue that the Second Circuit is not in conflict, the Government relies on an arbitrary and irrelevant distinction between the Second Circuit cases and the Seventh Circuit's decision below. Specifically, the Government argues that, because "there was neither a jury finding nor an admission by the defendant of the amount and type of drugs involved in the conspiracy as a whole," *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005), and *United*

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at 16.) Likewise, Petitioners explained that, while the First Circuit was the first to formulate the conspiracy-wide approach, in *Nelson-Rodriguez* it recognized that such approach is potentially infirm under certain circumstances. (Pet. at 18-19 n.3.) The Government points out that *Nelson-Rodriguez* did not overrule *United States v. Derman*, 298 F.3d 34 (1st Cir. 2002), though Petitioners did not contend that it did. (Resp. at 12 n.1.)

States v. Adams, 448 F.3d 492 (2d Cir. 2006), are not in conflict with the Seventh Circuit's decision, where the jury made a conspiracy-wide drug quantity finding. (Resp. at 16.) Contrary to the Government's assertion, the Second Circuit ***unequivocally*** requires a jury finding of drug quantity as to each defendant in a drug conspiracy beyond a reasonable doubt, if not admitted by the defendant, to sentence the defendant under an enhanced range of Section 841. *See Adams*, 448 F.3d at 500 ("We have held that a Section 846 conspiracy involving any of the enhancement-penalty provisions of Section 841(b)(1) includes the additional element of quantity. It also includes ***the requirement that a co-conspirator defendant at least could have reasonably foreseen the type and quantity of the substance about which she conspired.***") (emphasis added); *Gonzalez*, 420 F.3d at 125-28 ("[the defendant] could not be convicted of the charged § 841(b)(1)(A) conspiracy, or sentenced pursuant to the increased penalty ranges provided in that subsection, unless a jury found or [defendant] himself admitted the specified drug quantity element"); .

Similarly, the Government attempts to downplay the significance of Ninth Circuit precedent by arguing that it is only "in tension," but not "actual conflict," with the conspiracy-wide approach. (Resp. at 16-17.) Again, the Government draws the arbitrary factual distinction that the *Apprendi* error in *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003), involved only a guilty plea. (*Id.*) In so arguing, the Government ignores the *Banuelos* court's unequivocal statements against a conspiracy-wide approach to drug conspiracy sentencing:

> [T]he very finding of an *Apprendi* violation means that it was improper for the district court to determine drug quantity attributable to [the defendant] at sentencing without first informing [the defendant] ***of his right to a jury determination of drug quantity attributable to him beyond a reasonable doubt.*** The record reflects that the district court did not so advise [the defendant] and that [the defendant] did not explicitly waive ***his right to a jury determination of drug quantity attributable to him.***

322 F.3d at 706 n.4 (internal citation omitted) (emphasis added). Thus, the Ninth Circuit's decision in *Banuelos* leaves no doubt that it requires defendant-specific findings of drug quantity in drug conspiracy cases. Accordingly, the Second and Ninth Circuits, like the Fourth Circuit (which the Government concedes does not allow conspiracy-wide findings), hold that the conspiracy-wide approach that the Seventh Circuit followed below violates the Sixth Amendment.

II. THE GOVERNMENT'S POSITION ON HOW THE CONFLICT SHOULD BE RESOLVED SUPPORTS THIS COURT'S GRANT OF THE PETITION.

The Government spends a considerable portion of its Response arguing that this Court can reject the Petition because the conspiracy-wide approach the Seventh Circuit applied here is constitutional and

that the *Collins* decision and subsequent Fourth Circuit decisions requiring defendant specific jury findings are incorrect. (*See, e.g.*, Resp. at 10 (the Seventh Circuit "correctly held that the statutory maximum sentence under Section 841(b) is determined by a jury's finding of the amount of drugs involved in the conspiracy as a whole"); Resp. at 11; Resp. at 12 (defendant-specific findings are "contrary to the plain language of the drug statutes"); Resp. at 13-14; Resp. at 15 ("The ruling in *Collins* is incorrect.")). The Government's argument is, at best, circular because the constitutionality of the conspiracy-wide approach is the very question that the Petition presents. Indeed, the Government's challenges to the Fourth Circuit's reasoning for requiring defendant-specific drug quantity findings highlights the need for this Court's intervention. Though the conspiracy-wide precedent existed, the Fourth Circuit expressly held that this Court's decision in *Apprendi* required its departure from the conspiracy-wide approach, which the Fourth Circuit itself had applied prior to *Apprendi*. *Collins*, 415 F.3d at 314 (*Apprendi* "altered [our previous] holding by effectively replacing the words 'a district court' with 'the jury,' and requiring proof beyond a reasonable doubt").

Moreover, to support its position, the Government does little more than summarize the holdings of the cases that adopted the conspiracy-wide approach and this Court's precedent in *Edwards v. United States*, 523 U.S. 511 (1998).[2/]

2/ The Government's reliance on this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002) is misplaced. (Resp. at 14-

(Resp. at 11-14.) The Government fails to respond to Petitioners' explanation of why *Edwards*, which is a pre-*Apprendi* decision that relied exclusively on the power provided under the Sentencing Guidelines, was an inapposite source of authority for the First Circuit to invoke to formulate the conspiracy-wide approach in *United States v. Derman*, 298 F.3d 34 (1st Cir. 2002). (Pet. at 17-21.)

III. THE GOVERNMENT'S HARMLESS ERROR ARGUMENT FURTHER HIGHLIGHTS THE CONFLICT.

The gravamen of the Government's Response is its incorrect contention that "any error in failing to secure a jury finding on the drug quantity foreseeable to each defendant was harmless beyond a reasonable doubt," (Resp. at 20), because, even though Petitioners were sentenced under the enhanced range of Section 841(b)(1)(A), their actual

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15.) The Government incorrectly cites *Cotton* as indicia that the conspiracy-wide approach is constitutional. (Resp. at 14-15.) However, the Court in *Cotton* was not addressing whether a jury's drug quantity finding for the conspiracy as a whole is sufficient to sentence every convicted co-conspirator under the same sentencing range of Section 841(b)(1). The *Cotton* Court was considering whether the omission of a fact that enhances the statutory maximum sentence, drug quantity, from a federal indictment justifies a court of appeals' vacating the enhanced sentence, ***even though the defendant did not object in the trial court.*** 535 U.S. at 627 (emphasis added). The parties in *Cotton* conceded that there was an *Apprendi* error in failing to include drug quantity in the indictment and the Court was solely applying the plain-error test to the court of appeals' entertainment of the issue even though it was not raised at the trial court. *Id.* at 632.

sentences did not exceed the default maximum sentence under Section 841(b)(1)(C) (excluding Troy Lawrence).[3/] (Resp. at 17-19.)

The Second Circuit's 2005 decision in *Gonzalez* deals a fatal blow to the Government's harmless error argument. *Gonzalez* involved a co-conspirator defendant who pleaded guilty to an unspecified amount of crack, but was nevertheless sentenced under Section 841(b)(1)(A) after a judge determined the quantity of drug by a preponderance of the evidence. 420 F.3d at 116-18. The defendant received a sentence of 20 years – his mandatory minimum sentence under Section 841(b)(1)(A) after accounting for a prior felony conviction – which he could have also received for an unspecified amount of

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3/ It is axiomatic that, for an error to be harmless, there must be a predicate error. The Seventh Circuit held below, however, that there was no *Apprendi* error. In the cases cited by the Government (Resp. at 14, 20), the district courts' errors were conceded. *See Cotton*, 535 U.S. at 632 ("The Government concedes that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondents' enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones*."); *Neder v. United States*, 527 U.S. 1, 4 (1999) ("It is agreed that the District Court erred in refusing to submit the issue of materiality to the jury with respect to those charges involving tax fraud."). Though neither case has any application to this case, as *Cotton* involved only the application of the plain-error test to a court of appeals' decision to entertain an issue that was not raised at the trial court, (*see supra* note 2), and *Neder* involved the applicability of harmless error to an erroneous jury instruction that omitted an element of the offense, 527 U.S. at 4, they are perhaps most distinguishable because they contained conceded errors. Unlike *Cotton* and *Neder*, whether there was an *Apprendi* error is the constitutional question before this Court.

drug under Section 841(b)(1)(C). *Id.* at 115. In allowing the defendant to withdraw his guilty plea even though his sentence did not exceed the maximum under the default range of Section 841(b)(1)(C), the court recognized the disingenuous nature of the argument the Government currently advances in light of the fact that, under Section 841, the mandatory minimum and maximum sentences simultaneously change under each subsection:

> when drug quantity raises a mandatory minimum sentence under § 841, it simultaneously raises a corresponding maximum, thereby increasing a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime ... It would turn [*Apprendi*] on its head to conclude that a fact, such as drug quantity, which unquestionably increases the 'range of penalties to which a criminal defendant is exposed,' is not an element of the crime that must be pleaded and proved beyond a reasonable doubt (or admitted by the defendant) because it increases the mandatory minimum as well as the maximum.

420 F.3d at 126-27. Thus, the court ruled that unless a jury finds the drug quantity attributable to a defendant beyond a reasonable doubt, or the defendant admits a drug quantity, a harmful *Apprendi* violation occurs if a defendant is sentenced under the aggravated offenses in Sections 841(b)(1)(A) or (B), even if the actual sentence does

not exceed the statutory maximum for the non-aggravated offense in Section 841(b)(1)(C). *Id.* at 129.

The *Gonzalez* court reconciled its holding with this Court's holding in *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* does not apply to statutory minimum sentences, by explaining that Section 841, unlike 18 U.S.C. § 924(c)(1)(A) at issue in *Harris*, does not use a fact simply to identify increasing minimum sentences within a penalty scheme with a fixed maximum. 420 F.3d at 126-27. Rather, under Section 841, the mandatory minimum sentences and the maximum sentences change simultaneously. *Id.* The court stressed that, "*Harris* simply does not speak to that circumstance. It holds that, where a fact 'alter[s] only the minimum' sentence, without 'authoriz[ing] the judge to impose [a] ... higher penalt[y],' the Constitution permits the fact to be treated as a sentencing factor." *Id.* The Government does not even attempt to rebut Petitioners' demonstration that because of Section 841's sentencing scheme that has graduated minimum and maximum sentences, the Government's harmless error argument necessarily creates a zero-to-life sentencing range for any defendant convicted of participating, to any extent, in a drug conspiracy involving more than 50 grams of crack. (Pet. at 24.)

Similarly, the Sixth Circuit recently found plain error and reversed a defendant's sentence where the defendant was sentenced according to a mistaken enhanced statutory maximum, even though the defendant's sentence did not exceed the correct

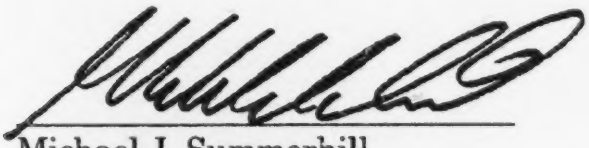
statutory maximum. In *United States v. Watson*, 476 F.3d 1020 (6th Cir. 2007), the defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 924(a)(2). The district court judge mistakenly believed that the defendant's statutory maximum sentence was 240 months, though the statutory maximum sentence was actually 120 months, and sentenced the defendant to 108 months. *Id.* at 1023-24. In finding plain error even though the defendant's actual sentence did not exceed the correct statutory maximum, the Sixth Circuit concluded that "the district court's erroneous premise gave it the mistaken impression it was being lenient and the error thus infected [the defendant's] sentence." *Id.* at 1024 (citation omitted).

Here, assuming an *Apprendi* error, the Government cannot establish beyond a reasonable doubt that Petitioners were not harmed when the district court sentenced them with the "erroneous premise" that the enhanced minimum and maximum sentences of Section 841(b)(1)(A) governed their sentences. Indeed, when sentencing some of the Petitioners, Judge Andersen of the Northern District of Illinois made comments similar to those of the district court judge in *Watson*, *i.e.*, that he thought he was imposing a sentence "considerably less" than the maximum. *See Watson*, 476 F.3d at 1024.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael J. Summerhill
Katten Muchin Rosenman LLP
525 West Monroe
Chicago, IL 60661
312-902-5200
Counsel of Record for Petitioners

Michael J. Summerhill
Bryan F. Stroh
Katten Muchin Rosenman LLP
525 West Monroe
Chicago, IL 60661
312-902-5200
Counsel for Petitioner Stacia Smith

Daniel P. Albers
Barnes & Thornburg
1 N. Wacker Dr.
Suite 4400
Chicago, Ill. 60606
312-357-1313
Counsel for Petitioner Andre Lawrence

James A. Shapiro
Shapiro & Brindley
53 West Jackson Blvd
Suite 1001
Chicago, Illinois 60604
312-782-4615
Counsel for Petitioner Kent Clark

Franklin C. Cook
524 W. Stephenson St.
Freeport, IL 61032
815-233-5711
Counsel for Petitioner Artrez Nyroby Seymour

Kent R. Carlson
KENT R. CARLSON & ASSOCIATES P.C.
53 West Jackson Boulevard
Suite 1544
Chicago, Illinois 60604
312-663-9601
Counsel for Petitioner Troy Lawrence

Richard L. Zaffiro
4261 N. 92nd St.
Wauwatosa, WI 53222-1617
(414) 737-1956
Counsel for Petitioner Andre Seymour